Mah Siew Keong v Bayu Gamitan Sdn Bhd and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO A-02-576 OF 2000, NO A-02-577 OF 2000, NO A-02-578 OF 2000, NO A-02-579 OF 2000 AND NO A-02-589 OF 2000

GOPAL SRI RAM, ABDUL HAMID MOHAMED AND ALAUDDIN JJCA

28 AUGUST 2001

Civil Procedure *— Contempt of court — Breach of injunction — Ambiguity — Injunction drafted in wide and ambiguous terms — Burden to seek clarification — Whether contempt proved*

There were five appeals before this court and they were all directed at an order of the High Court under which the appellant in each of these appeals was found guilty and convicted for contempt of court for failing to observe an ex parte injunction dated 17 March 2000. Each of the appellant was ordered to face a term of imprisonment. The fine and default terms vary with each appellant.

Held, allowing the appeal:

If an ex parte injunction was drafted in wide and ambiguous terms, it was, difficult, if not impossible, to identify particular acts of contempt. Further, it was not appropriate in the present case to require the appellants as directors or their company to seek clarification from the court as this would place an intolerable burden on the parties. It would mean that at every turn of an event, the director and the company would have to rush into court to find out if the acts they propose to do would offend the terms of the order. Put in that fashion, one could plainly see the ambiguity in the order (see p 109D–F).

[Bahasa Malaysia summary

Terdapat lima rayuan di hadapan mahkamah ini dan semuanya ditujukan kepada satu perintah Mahkamah Tinggi di mana perayu dalam setiap rayuan ini didapati bersalah dan disabitkan kerana menghina mahkamah kerana gagal untuk mengambil perhatian terhadap injunksi ex parte bertarikh 17 March 2000. Setiap seorang daripada perayu telah diperintahkan untuk menjalani hukuman penjara. Denda dan terma-terma jika gagal berbuat demikian berbeza antara setiap perayu.

Diputuskan, membenarkan rayuan tersebut:

Sekiranya satu injunksi ex parte telah didrafkan dalam term-terma yang luas dan taksa, ia adalah sukar, jika tidak mungkin, untuk mengenalpasti tindakan-tindakan penghinaan tertentu. Tambahan pula, adalah tidak sesuai dalam kes untuk mendesak perayu-perayu sebagai pengarah-pengarah atau syarikat mereka untuk mendapatkan

kepastian daripada mahkamah kerana ini akan amat membebankan pihak-pihak tersebut. Ini bermakna dalam setiap kejadian yang berbeza, pengarah dan syarikat tersebut terpaksa bergegas ke mahkamah untuk mendapat tahu jika tindakan-tindakan yang mereka bercadang untuk lakukan akan menyalahi terma-terma perintah tersebut. Jika demikian, sesiapapun boleh melihat ketaksaan dalam perintah tersebut (lihat ms 109D–F).] A B

Notes

For cases on contempt of court, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1423–1540. C

Cases referred to

Spectravest Inc v Aperknit Ltd [1988] FSR 161 (refd)

DP Naban (*Gopi Seshadari* and *LK Chow* with him) (*Lee Hishamuddin*) for the appellants in Civil Appeals No A–02–576 of 2000, No A–02–577 of 2000, No A–02–578 of 2000 and No A–02–579 of 2000. D

Silvanathan (*Rathi Nair* with him) (*Kean Chye & Sivalingam*) for the appellant in Civil Appeal No A–02–589 of 2000.

R Thayalan (*Lingam & Co*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): There are five appeals before us. They are all directed at an order of the High Court under which the appellant in each of these appeals was found guilty and convicted for contempt of court for failing to observe an ex parte injunction dated 17 March 2000. Each appellant was ordered to pay a fine and in default of such payment, was ordered to face a term of imprisonment. The fine and default terms vary with each appellant. E F

The order, the breach of which is complained of, reads as follows in its material part:

> And it is further ordered and directed that the defendant whether by themselves, their agents and/or their servants and/or their directors of howsoever from doing any act or acts in contrary or in contravention to any of the provisions of the Joint Venture Agreement dated 28 May 1996 entered into between the plaintiff and the defendant pending final determination of the plaintiff's suit herein; G

At the commencement of these appeals, we formed the preliminary view that the learned judge's findings in all the circumstances of the case were not sustainable. Accordingly, we called upon the respondent to address us with a view of satisfying us that the learned judge was indeed right in appellants guilty of contempt. H

In our view, the several procedural grounds raised by the appellant in the court below are of little or no consequence. The substantive point upon which these appeals turn relates to the precise manner in which the injunction is supposed to have been violated. A reading of the learned I

judge's judgment finding the appellant guilty relates to the failure of the company (of which the instant appellant is a director) failed to execute certain deeds of assignment. According to the respondent, it was incumbent upon the company to execute these deeds under the terms of the joint venture agreement that subsisted between the parties. The appellant company of which the appellants in the other appeals before us are directors, did enter into a joint venture agreement with the respondent on 28 May 1996. The precise clause on which the respondent relies in support of its case is cl 11.01(f). It falls under the sub-intitulement 'Covenants of the Owner'. This is what it says:

> to execute and be a party to all sale and purchase agreements and execute all necessary documents to complete the sale in respect of the sales of the Developer's Entitlement to end purchasers within seven (7) days of being requested to do so.

Mr Thayalan for the respondent has argued that if one reads the order together with the above clause and the surrounding circumstances, one may discern a duty on the part of the appellants' company to execute the deeds in question. With respect, we are unable to agree with this argument.

If the respondent wanted the appellants' company to execute the deeds of assignment, then it should have taken greater care in settling the terms of injunction it sought and obtained from the High Court. In our view, if, as here, an ex-parte injunction is drafted in wide and ambiguous terms, it is, difficult, if not impossible, to identify particular acts of contempt. Further, it is not appropriate in the present case to require appellants as directors or their company to seek clarification from the court as this would place an intolerable burden on the parties. It would mean that at every turn of an event, the director and the company would have to rush into court to find out if the acts they propose to do would offend the terms of the order. Put in that fashion, one can plainly see the ambiguity in the order.

So far as authority is concerned, we find it unnecessary to go beyond citing the passage in *Arlidge, Eady & Smith on Contempt* (2nd Ed) paras 12–43 at p 746. The relevant paragraph reads as follows:

> An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. On the other hand, in cases where one is concerned with third parties who are seeking to subvert the purpose of a court order, the court is not confined to looking at the strict terms. Even a party might be held in contempt if such a purpose could be demonstrated, notwithstanding ambiguity in the wording.

No doubt there are qualifications to the foregoing proposition in cases involving intellectual property and defamation as illustrated by the illuminating judgment of Millet J in *Spectravest Inc v Aperknit Ltd* [1988] FSR 161 but the present instance is not one such case. The cautionary words of Millet J therefore do not apply to the facts of the appeals before us.

While there might be much to be said about Mr Naban's complaints in relation to certain passages in the judgment appealed against, we find that

no useful purpose will be served in dealing with these arguments. It suffices to dispose of these appeals upon the point we have alluded to earlier in this judgment.

For the reasons already given, these appeals must succeed. The orders of the learned judge are set aside. The fines, if paid, are to be refunded to each appellant. The security deposit for each appeal is to be refunded to the respective appellants. The costs of these appeals and in the court below are to be borne by the respondent. However, in respect of the four appeals, there shall be only one fee for getting up. The appellant in the fifth appeal shall be entitled to charge a separate fee for getting up but it shall not be greater than the fee allowed by the taxing registrar in respect of the first four appeals.

Appeal allowed.

Reported by Peter Ling